STATUTES INVOLVED

Statutes pertinent to the consideration of this application are Title 12, U.S.C., Section 1707, which is set out in Appendix B; Section 1750, U.S.C., Title 12, which is set out in Appendix C; Section 7.28.230 of the Revised Code of Washington, which is set out in Appendix D hereto.

QUESTIONS PRESENTED

Where a corporation gives a mortgage on Washington real property to a bank, does the fact that the mortgage is insured by the Federal Housing Administration, permit the insertion in the mortgage contract, and its enforcement by the Court on foreclosure, of a clause, otherwise illegal in the jurisdiction, permitting the mortgagee in any action to foreclose to have a receiver appointed for the property with authority to collect and apply on principal the rents and profits of the mortgaged premises due and becoming due during the pendency of the foreclosure suit?

Does the fact that a mortgage is insured by the Federal Housing Administration, in the absence of any showing of waste or danger of loss or destruction of the security, authorize the appointment of a receiver of the mortgaged property pending foreclosure where such authority would not exist if the property were not so insured?

STATEMENT OF THE CASE

The Circuit Court of Appeals affirmed an order of the district court appointing a receiver in a mortgage foreclosure action brought by the government to foreclose a mortgage upon the property known

as "View Crest Garden Apartments" at Bremerton, Washington (Tr. 3). The mortgage was originally given by View Crest Garden Apartments, Inc., to the National Bank of Commerce of Seattle and was insured by the Federal Housing Administration. The government sued as assignee of the mortgage (Tr. 9), and sought to have a receiver appointed to take possession of the property pendente lite and to collect the rents and profits pursuant to a provision in the mortgage pledging the property, "together with all the rents, issues and profits of said realty . . . " (Tr. 7).

The mortgage further provided (Tr. 125),

> "* * *that the holder of this mortgage in any action to foreclose shall be entitled to the appointment of a receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises due and becoming due during the pendency of such foreclosure suit. Such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage without regard to the value of the mortgaged premises or the solvency of any person or persons liable for the payment of the mortgage indebtedness. The mortgagor for himself and and subsequent owner hereby waives any and all defenses to the application for a receiver as above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed to deprive the holder of the mortgage of any right, remedy or privilege it may now have under the law to have a receiver appointed."

Under the statutes and decisions of the State of Washington, such a provision in a mortgage is ille-

gal. Section 7.28.230 of the Revised Code of Washington provides:

> "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

That section has been interpreted by the Washington courts as rendering void any agreement to include the rents and profits as a part of the mortgage security for a loan. *Peoples Savings and Loan Assn. v. Smith*, 174 Wash. 289; 24 P.(2d) 644; *Clise v. Burns*, 175 Wash. 173; 26 P.(2d) 627; *Western Loan & Building Co. v. Mifflin*, 162 Wash. 33; 297 Pac. 743; *State ex rel Gwinn, Inc. v. Superior Court*; 170 Wash. 463; 16 P.(2d) 831. No question was raised below that such a provision in a mortgage not insured by a Federal agency would be void and unenforceable in Washington.

After the action was commenced, an order to show cause was issued citing the defendants to appear and show cause why a receiver should not be appointed (Tr. 23). The Court, on June 11, 1958, entered an order restraining the defendant, View Crest Garden Apartments, Inc. from disposing of any funds that it may receive or has received from rents and collections from the project in issue provided that it shall have authority to maintain and operate the project in a normal manner and pay the normal maintenance and operating costs and expenses of the project from the rents and receipts received or to be received from rents and collections as aforesaid (Tr. 33). Thereafter, on the 29th of September, 1958, the district court entered an order denying plaintiff's application for the appointment

of a receiver but continuing in effect the restraining order on the disposition of rents and profits (Tr. 58). In its order, the court stated:

> "* * * and the court being now of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and further than an immediate appeal of said order may materially advance the ultimate termination of the subject litigation."

The court stayed all further proceedings until the government should have an opportunity to take an interlocutory appeal (Tr. 60). The government did take the interlocutory appeal which resulted in a decision of the Ninth Circuit Court of Appeals, dated June 22, 1959, reported in 268 F.(2d) 380, whereby the court remanded the matter to the district court with instructions to make a determination as a matter of Federal law whether the facts warrant the appointment of a receiver.

Thereafter, on December 9, 1959, the trial court entered an order appointing receiver (Tr. 79), which provides in part:

> "That a receiver pendente lite for the rents issues and profits of the mortgaged premises described in the complaint on file herein be appointed * * *
> "Said receiver is hereby directed to manage and conserve the assets of said property, collect the rents, the issues and profits of the same due and becoming due during the pendency of this action."

The court has made *no finding of waste* of the property *nor did the court at any time find that the property was in danger of being lost or destroyed during foreclosure.*

An appeal was taken from the order appointing receiver. The Circuit Court of Appeals affirmed the lower court and in doing so stated (Tr. 130):

> "We hold that in an action brought to foreclose a mortgage insured under Title IX of the National Housing Act, a district court is empowered under the terms of the mortgage and on application of the holder thereof, to appoint a receiver to collect the rents, issues and profits during the pendency of the foreclosure action, at least when he is satisfied the security is inadequate, or its adequacy is substantially doubtful, and the mortgagor is insolvent or of doubtful financial standing."

The court further based its affirmance of the lower court upon the proposition that delay would occur in the foreclosure and said (Tr. 133):

> "We think impossibility or impracticability of prompt foreclosure, irrespective of the fault therefor, is a circumstance proper for consideration, and that in appointing a receiver with broad authority the court acted well within the discretionary power a court of equity exercises in appointing a receiver."

SUMMARY OF ARGUMENT

Congress, in enacting the National Housing Act, created only a system of mortgage insurance by which the administrator was authorized to guarantee the types of mortgage liens commonly given under existing law and did not, by the enactment, or by any delegated authority to the Housing Commissioner provide for any change in the permissible mortgage contracts, nor expressly or impliedly change the nature or incidents of mortgages merely

because of their becoming insured by the Federal Housing Administration.

The deprivation of a mortgagor's property rights in the rents and profits of the mortgaged premises prior to foreclosure and sale by the appointment of a receiver, in the absence of fault or wrong doing upon the part of the mortgagor, is a taking of property without due process of law, in violation of the Fifth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

This petition raises matters of first impression in this court as to the affect of Federal mortgage insurance and the powers of the Federal Housing Administrator with respect to the mortgages which he insures. This court has already noted probable jurisdiction in a case having features similar to this one, *United States v. John Hancock Mutual Life Insurance Co.,* (S.Ct. No. 565), which was decided by the Supreme Court of Kansas and is reported in 341 P.(d) 1002. The principles enunciated in the latter case to the effect that safeguards to mortgages under ordinary rules of law apply where the government is the mortgagee are entirely in conflict with the decision of the Ninth Circuit Court of Appeals in this case and an important question of Federal law is presented but which has not been, and which should be, settled by this court. The consideration by this court of both the case of *United States v. John Hancock Mutual Life Insurance Co.,* supra, and this case will present this entire question of alteration of the incidents of the mortgage contract where the Federal government assumes the position of the mortgagee.

The principles applicable to this case, with respect to the affect of insurance by a Federal agency of a mortgage are involved in all of the thousands of outstanding F.H.A., G.I. and other insured mortgages on every type of property throughout the country, and the determination of these questions is a matter of interest to a broad segment of the population who are mortgagors under such insured mortgages.

The essence of this case is that the Circuit Court of Appeals has held that the Housing Commissioner has authority, by regulation, to have included in mortgages taken by private lending institutions of clauses surrendering on the part of the mortgagor his rights of possession prior to foreclosure and sale and his right to rents and profits during that time (Tr. 130). Such a provision in a mortgage is in direct conflict with the law of the State, Section 7.28.230, Revised Code of Washington, which reads:

> "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

This section has been expressly construed as prohibiting any such surrender, *Clise v. Burns*, 175 Wash. 133, 26 Pac (2d) 623.

Congress has not, either expressly or impliedly, indicated any intent to establish a peculiar type of Federal mortgage. There is no statute defining a mortgage for Federal purposes.

The Circuit Court has misconceived the function of the Federal Housing Administrator, whose duty under the National Housing Act, is to determine what type of mortgages *commonly given under the*

laws of the various states concerned offer security sufficient to protect the interests of the Federal insuring agency, but whose duty is not to establish an uncommon and otherwise illegal type of mortgage in the state merely because it is to be insured. Congress itself has indicated the kinds of mortgages that the Housing Administrator is entitled to insure in Section 1707 of Title 12 of the United States Code, where it defines the term "mortgage." The pertinent portion of that section reads:

> "* * * and the term "first mortgage" means such classes of first liens *as are commonly given* to secure advances on, or the unpaid purchase price of, real estate *under the laws of the state* with credit instruments, if any, secured thereby." (Emphasis supplied).

What we are faced with in this case, and in the case of *United States v. John Hancock Mutual Life Insurance Co.*, No. 565, 341 P.(2d) 1002, supra, is the situation where the Federal Housing Commissioner has not been content with insuring mortgages of the types otherwise legal in the states, but has inserted into the mortgage contracts provisions waiving various rights of the mortgagors. Thus, in the present case, and in the *John Hancock Mutual Life Insurance Co.* case, the Federal Housing Administrator inserted in the mortgage instrument a provision to the effect that the mortgagee is entitled to possession prior to foreclosure and sale, and to a receivership during that period for the rents and profits accruing. The Federal Administrators have not been content to reject if they deem them as inadequate security, insurance upon mortgages having the conventional safeguards for mortgagors recognized by the laws of the states in which

they are given; but have undertaken to devise their own type of mortgages. In the *John Hancock Mutual Life Insurance Co.* case, the government agency required the mortgagor to waive the benefits of homestead, dower, exemption valuation, appraisement, stay and moratorium laws and rights of possession during the redemption. Under the *principle* enuncitated by the Ninth Circuit Court of Appeals in this case, the Federal Housing Administrator could do likewise and could require the mortgagor in all F.H.A. and G.I. cases to waive all those protections.

In view of the fact that there is no Federal mortgage statute and therefore, no safeguards are established by Federal law, as to mortgagors, the principle announced by the Circuit Court in this case lays open to the lending banks the way to exact mortgage contracts containing waivers of all of the mortgagor's traditional safeguards. If by merely insuring a mortgage with a Federal agency, a lending bank can secure a waiver of the rights of possession during foreclosure, it could also insert in the mortgage the waiver of all exemption rights, redemptions and other protections. In view of the extreme prevalence of insured mortgages of various kinds, the implications are tremendous.

The particular mortgage involved in this case is one given under Title IX, of the National Housing Act, which is the section designed to encourage the building of housing in critical defense areas. This type of insurance has made available to prospective builders funds with which to erect housing in places not otherwise attractive but which will provide standby housing capacity desired by congress in case of national emergency. Such was the case here

where this petitioner was induced to construct a housing project in an area where it would be vitally needed in case of national emergency but which would have been a doubtful investment for private capital during the standby peace period.

Congress intended the same considerations to be applied to Title IX mortgages as to other Federal Housing Administration mortgages, as in Title 12, Section 1750, United States Code, it defined mortgages for the purpose of insurance under Title IX as follows:

> "As used in this subchapter, the term mortgage, first mortgage, mortgagee, mortgagor, maturity date and state shall have the same meaning as in Section 1707 of this title."

Thus, the particular mortgage in this case relates back to the definition of mortgage previously quoted and Congress expressly showed that it intended that what the Housing Administrator was to insure was the type of mortgage *commonly* given to secure advances for the unpaid purchase price of real estate under the laws of the state in which the real estate is located.

The legal mortgage contract is a thing which varies from state to state. Obviously Congress did not intend that all insured mortgages should be uniform in the scope of lien or in the incidents of the mortgage throughout the several states and jurisdictions, otherwise it would have never provided that the mortgages should be the type of liens *commonly* given *in the states* in which the real estate is located. Thus, for example, we believe it perfectly apparent that a trust deed in the nature of a mortgage such as might be given in the District of Columbia, whereby the mortgage becomes a deed

conveying title defeasible only by the condition subsequent of payment (Section 45-601, Title 45, District of Columbia Code) could not be given in the State of Washington, where by law the mortgage is merely a lien for security which can result in a property right only upon foreclosure and sale. Congress has said that the type of mortgages to be insured are those *commonly* given under the laws of the states in which the property is located. Under the laws of the State of Washington, the scope of a lien of a mortgage on property simply does *not extend to rents and profits* and the Supreme Court of Washington has so held. *Norfor v. Busby,* 19 Wash. 450, 53 Pac. 75, *Western Loan and Building Co. v. Mifflin,* 162 Wash. 233, 297 Pac. 743, *State ex rel Gwinn, Inc. v. Superior Court,* 170 Wash. 463, 16 P.(2d) 831.

The action of the lower court in this case in upholding the receivership is not based upon waste or danger to the pledged security but is based upon the clause in the mortgage itself authorizing possession and receivership prior to foreclosure. This court in the case of *Teal v. Walker,* 111 U. S. 242, 28 Law Ed. 415, recognized that in the absence of waste, in a state following the lien theory of a mortgage, there is no right to possession of the mortgaged premises prior to foreclosure nor to a receiver for the rents and profits during that period. This court said:

> "For if a mortgage is not a conveyance and the mortgagee is not entitled to possession his claim to the rents is without support. This is recognized by the Supreme Court of Oregon as the effect of a mortgage in that state * * *
> "The case of the defendant in error cannot be aided by the stipulation and the defeasance of

> August 19, 1874, exacted by the mortgagee that Goldsmith and Teal would upon default in the payment of the note secured by the mortgages deliver to Huitt, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon as expressed in the statute just cited and was not binding upon the mortgagor or his vendee and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced."

There is simply no question that under the laws of the state in which this mortgage was given, it is not competent for a mortgagor to pledge the rents and profits as security for the debt. In *Clise v. Burns*, 175 Wash. 133, 26 P (2d) 627, the Supreme Court of Washington said:

> "That a provision in a real estate mortgage pledging the rents and profits as security for the debt and consenting to the appointment of a receiver to collect the same pending foreclosure will not be enforced since it is a violation of the policy of the law that a mortgage is a lien and not a conveyance and vests the right of possession in the mortgagor until after foreclosure."

Congress in authorizing the Housing Administrator to insure as mortgages the type of liens commonly given in the respective states, did not authorize creation for the purpose of insurance of a type of lien not commonly given.

A lien upon the rents and profits of the real estate is not commonly given in Washington and is not within the scope of the authorized insurable mortgage. The Federal Housing Administrator is bound by the statute to deal in mortgages which are

the types of liens *commonly* given to secure the purchase price of real estate in the states in which the real estate is located. The Commissioner could not, by inserting a clause, in a form of mortgage or by making a rule or regulation authorize a lending agency to enter into a kind of mortgage not otherwise legally given in the jurisdiction.

There is no reason why the Federal Housing Administrator cannot insure the type of mortgages that serve to secure all other loans of money in this jurisdiction and certainly the expressions of Congress have not indicated any intent to provide for insurance only of mortgages of a type strange to the jurisdiction. We think that the language of the Third Circuit Court of Appeals in *U. S. vs. Cless*, 254 F.(2d) 590, 594, is here pertinent. The court said:

> "In the absence of express Congressional action to the contrary, we do not think it is asking too much for a Federal agency which has embarked upon the business of lending money in competition with private firms and individuals simply to be governed by the same local law which controls the rights of private citizens in a similar endeavor."

While the government did not lend any money in this case, the implication of the decision of the Circuit Court of Appeals in the present case is that the Federal insuring agency can authorize a private lending institution to exact a mortgage otherwise illegal. Congress has said no such thing.

Congress intended by the National Housing Act to accommodate the mortgage insurance provisions to the situations in the various states and the act can be perused in vain to find any implication that

uniformity in the mortgage contract or in the scope of the lien of a mortgage is required in all of the states. What the Eighth Circuit Court of Appeals said in *U. S. v. Kramel*, 234 F.(2d) 577, could well be said of the National Housing Act:

> "This legislation was general in its intentions to make or insure loans in all states. Congress must have known that state laws affecting or protecting titles and their attributes such as possession, for example—are not identical in all the states. Yet, this legislation omitted any reference to tihs inevitable situation. From this omission, we must conclude that here Congress did not deem that the complete uniformity now urged by the government was necessary to effectuate the purposes it intended to accomplish by the act. *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U.S. 204, 209-210, 66 S.Ct. 992, 90 Law Ed. 1172."

The function of the Federal Housing Administrator, if he believed that the security under the commonly given type of mortgage in Washington was inadequate to protect the interests of the government was to decline to issue the insurance, but instead he undertook to authorize the lending bank to exact a type of mortgage otherwise illegal and requiring the mortgagor to waive rights which under all other mortgages in the jurisdiction, the mortgagor could not legally waive.

If the lien of the mortgage under the State law of Washington does not permit possession prior to foreclosure, as it does not under Section 7.28.230 of the Revised Code of Washington, there is no right to have a receiver merely to put the mortgagee vicariously into possession in the absence of some special conditions such as waste or a threat to the security merely because the housing administration

has insured the mortgage. All other mortgages in the State of Washington have the characteristic that before a receiver may be appointed to take charge of the rents and profits, three conditions must appear

> " * * * it appears that the three essentials or conditions which justify the appointment of a receiver in mortgage foreclosure proceedings are (1) that waste was being committed, (2) that the security is inadequate and (3) that the mortgagor is insolvent." *Peoples Savings and Loan Assn. v. Smith*, 174 Wash. 289, P.(2d) 644.

While it is true that a receiver may always be appointed to protect endangered security, this court pointed out in *Friedman's Savings and Trust Co. v. Shepherd*, 127 U.S. 494, 32 Law Ed. 163,

> " * * * courts of equity always have the power where the debtor is insolvent and the mortgaged property is insufficient security for the debt *and there is good cause to believe that it will be wasted or deteriorated* in the hands of the mortgagor as by cutting off timber sufferdelapidation and so forth, to take charge of the property by means of a receiver and preserve not only the corpus but the rents and profits for the satisfaction of the debt. When justice requires this course to be pursued and it is resorted to by the mortgagee, it will give him ample protection." (Emphasis supplied)

In this case there is no evidence of any danger of waste or destruction of the mortgaged premises themselves and since the *lien* of the mortgage in this jurisdiction *does not extend to the rents and profits* but only to the real estate itself, there is simply no occasion to appoint a receiver to take

charge of that which has not been pledged and as to which the mortgagee has no interest.

The Decision Takes Property Without Due Process of Law

The trial court in this case, in its opinion (Tr. 88), held that Federal law did not permit the appointment of a receiver in the type of mortgage we have in this case unless there is a showing of waste but then proceeded to grant the receivership on the sole ground that further delays in the foreclosure of the mortgage might be expected. (Tr. 101). These further delays arise from the fact that the trial court has stayed the trial of the main action until the question of whether a receiver should have been appointed pendente lite is fully determined. (Tr. 60). This petitioner in the Circuit Court of Appeals raised the question that this matter has been at issue and ready for trial so far as the mortgagor is concerned since June 13, 1958 (Tr. 46). The matter has merely been stayed by the court to give the government an opportunity to get an interlocutory legal point regarding a receiver settled before trial. The interlocutory issue accounts for all the time that has elapsed since the case was stayed. This was a matter involving *no breach of duty or wrongful action of the defendant* nor is there any claim that any wrong or breach of duty on the part of the defendants is now staying the trial. However, the Circuit Court of Appeals (Tr. 133) said:

> "We think the impossibility or impracticability of prompt foreclosure *irrespective of fault* therefor is a circumstance proper for consideration, and that in appointing a receiver with broad authority the court acted well within the

> discretionary power a court of equity exercises in appointing a receiver." (Emphasis supplied)

And, upon that basis, the decision of the trial court was affirmed.

This brings us to the point that the court has found that irrespective of the fault therefor, a mortgagor may be deprived of his valuable *property rights* in the rents and profits accruing prior to foreclosure and sale simply because of a fortuitous circumstance or the whim of the court or opposing counsel that will prevent a prompt trial.

The right of the mortgagor to remain in possession until foreclosure and sale, which is an incident of the legal mortgage contract in the State of Washington (See Section 7.28.230 Revised Code of Washington) is a property right. This property right of the mortgagor may not be taken without due process of law. In a state such as Washington, the mortgage contract could not validly pledge the rents and profits nor include any valid agreement for the entry by the mortgagee prior to foreclosure and sale. The taking of these rents and profits and the seizure of the property prior to foreclosure and sale thus *cannot be justified on the basis of contract.*

The cases in which receiverships have been allowed in jurisdictions where the rents and profits may not be pledged, have invariably rested upon the finding of waste to the security. Even the cases of *Garden Homes v. U.S.*, 207 F (2d) 459, and *Friedman's Savings and Trust Co. v. Shepherd*, 127 U.S. 494, 32 Law. Ed. 163, which were relied on below by the government were rested upon a showing of something further than mere insolvency and inadequacy of the security and an analysis of virtually all of the cases where a receiver has been allowed

in cases under laws of this kind will show that the finding has been based upon waste. Thus, in *Totten v. Harlowe*, 90 F. (2d) 377, cited by the trial court, the court said:

> "In some of the states the rule is that there must be a showing of waste in addition to inadequacy of security and insolvency of debtor before a court of equity will render its aid to a mortgagee."

Washington is such a state. *Peoples Savings and Loan Assn. v. Smith*, 174 Wash. 289, 24 P.(2d) 644.

The Federal courts have consistently held that laws of *property* are something peculiarly within the purview of state legislation, and this includes the right to determine what is included in a mortgage. In *Rubenstein v. Norse*, (8 CCA), 70 F. (2d) 482, the court said on page 484:

> "Each state has a right to determine for itself the extent of the right conferred by a mortgage. * * * In other words, the validity and effect of a mortgage lien are to be determined by the laws of the state in which the property on which the lien is asserted is situated."

To the same effect, see *Harvey v. Rhode Island Locomotive Works*, 93 U.S. 664, 23 Law. Ed. 1003; *Green v. Van Buskirk*, 72 U.S. (5 Wall.) 307, 18 Law. Ed. 599; *New York Trust Co. v. Island Oil and Transport Co.* (2CCA) 33 F. (2d) 104, 79 A.L.R. 1007; *In re Circle Trading Co.* (2 CCA) 26 F. (2d) 193; *Clark v. Huckaby*, 28 F. (2d) 154. Thus, under established Federal law, the effect of a mortgage had to be governed by state law, and that determined the scope of the mortgage contract and limited the pledge of the mortgage to that which was

permitted under state law. Under state law, the right to possession until foreclosure and sale was the property of the mortgagor and not having been validly divested by contract, it could be taken away only by something constituting the *wrongful act* of the mortgagor.

The reason for permitting a foreclosure in cases of waste, is readily apparent because there the wrong of the mortgagor is jeopardizing the security which has been pledged and wrongdoing is a basis for depriving the mortgagor of the property rights which he is misusing.

Waste of the pledged property is the first essential to the appointment of a receiver under the Washington mortgage contract. Dissipation of rents and profits which are not pledged is not grounds for the appointment of a receiver. In order to take the rents and profits of the mortgagor which he has not pledged, that must be a reasonable incident of the protection of the pledged security which is the property itself. Waste of the pledged property would justify such a taking because it is a wrongful act. Waste is defined in 56 Am. Jur. 450 in the following terms:

> "Waste, as herein considered, is a *species of tort,* which may be briefly and very generally defined as the destruction, *misuse,* alteration, or *neglect* of premises by one lawfully in possession thereof, to the prejudice of the estate or interest therein of another. It has also been variously defined, more specifically, as the destruction or material alteration of any part of a tenament by a tenant for life or years, to the injury of the person entitled to the inheritance; as *an unlawful act or omission of duty* on the part of the tenant which results in permanent

injury to the inheritance; as any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends toward the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance or to destroy the identity of the property, or impair the evidence of title; as any spoil or destruction done or permitted with respect to lands, houses, gardens, trees or other corporeal hereditaments by the tenant thereof, to the prejudice of him in reversion or remainder, or, in other words, to the lasting injury of the inheritance; as a destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate; *as an unreasonable and improper use and abuse, mismanagement or omission of duty* touching real estate by one rightfully in possession, which results in substantial injury thereto; and as a violation of the obligation of the tenant to treat the premises in such a manner that no harm is done to them, and that the estate may revert to those having the reversionary interest without material deterioration." (Emphasis supplied)

It will be noted that the elements of waste involve unlawful acts and omissions, improper use and abuse and mismanagement or breach of duty on the part of the one in possession of the property. The same text in 56 Am. Jur., page 451, goes on to say:

"As is apparent from the definition already given, an act to constitute waste must be wrongful * * *"

The mere fact that delay has occured or will occur does not make out a case of waste justifying the appointment of a receiver. The taking of a valuable

property right *regardless of fault* as the Circuit Court has indicated would be proper, we submit, is a confiscation of the mortgagor's property.

If the appointment of a receiver, due to delays brought about by causes not created by the mortgagor result in taking of the valuable property of the mortgagor, then that property is being taken unreasonably and is being taken without due process of law in violation of the Fifth Amendment to the Federal Constitution.

Respectfuly submitted,

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN

By Lyle L. Iversen
Attorneys for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VIEW CREST GARDEN APARTMENTS, INC., et al.,
Appellant,

vs.

No. 16,761
Aug. 2, 1960

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

Before: BARNES, HAMLEY and HAMLIN, Circuit Judges.

HAMLIN, Circuit Judge.

The Government brought this action to foreclose a mortgage on property known as View Crest Garden Apartments, located in Bremerton, Washington. This appeal involves the power of the District Court to appoint a receiver during the pendency of the foreclosure action.

The mortgage was originally given by appellant View Crest Garden Apartments, Inc., as mortgagor, to the National Bank of Commerce of Seattle, as mortgagee, to secure payment of indebtedness evidenced by a contemporaneous note executed by appellant in favor of the Bank. The Federal Housing Commissioner subsequently became the assignee of the note and mortgage.

Mortgage insurance was provided by the Federal Housing Commissioner pursuant to Title IX of the National Housing Act, as amended, 12 U.S.C.A. § 1750 et seq. Both the note and mortgage were on FHA forms. The mortgage provided that, in any action to foreclose, the holder would be entitled to appointment of a receiver to collect the rents due and becoming

due during the pendency of the action, such rents "being hereby assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage . . ."

Appellant defaulted and this action was instituted. In its complaint the Government prayed for appointment of a receiver pende lite to take charge of and manage the premises, collect the rents, and apply the proceeds on the debt. The District Court denied the petition for appointment of a receiver for the reason that Washington law applied and did not permit appointment of a receiver under the facts of the case. The Government took an interlocutory appeal from this order and we reversed, holding that the District Court erred in applying state law rather than federal law as controlling. Accordingly, the case was remanded with instructions to the District Court to make a determination as a matter of federal law whether the facts warrant appointment of a receiver. *United States v.*

[1] The relevant provisions are, in full, as follows:

"That if there is a default, regardless of whether or not the Mortgagee elects to foreclose this mortgage, the Mortgagee may collect all rents which may become due on the above property, reduc therefrom any necessary operating expenses and five per centum (5%) of the gross rents collected as compensation for making the collections, and apply the remainder on the balance due on the mortgage.

. . .

"That the holder of this mortgage, in any action to foreclose, shall be entitled to the appointment of a receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises due and becoming due during the pendency of such foreclosure suit, such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage, without regard to the value of the mortgaged premises or the solvency of any person or persons liable for the payment of the mortgage indebtedness. The Mortgagor for himself and any subsequent owner hereby waives any and all defenses to the application for a receiver as above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed to deprive the holder of the mortgage of any other right, remedy or privilege it may now have under the law to have a receiver appointed."

[2] We stated that "The United States Supreme Court has suggested a starting point for developing federal decisional law in nondiversity cases by pointing to the rules developed by the federal courts in diversity cases before Erie R. Co. v. Tompkins, 304 U.S. 64 . . ." citing **Clearfield Trust Co. v. United States**, 318 U.S. 363, 367; **United States v. View Crest Garden Apts., Inc.** (9 Cir. 1959) 268 F.2d 380, 383.

View Crest Garden Apts., Inc. (9 Cir. 1959) 268 F.2d 380, cert. den. 361 U.S. 885.

On remand the District Court entered an order appointing a receiver with power to collect rents and manage the property.[1] In an oral opinion the Court first noted that the property mortgaged was and is inadequate in value to discharge the indebtedness allegedly due and owing, and that the appellant will be unable to satisfy any deficiency. After discussing *Totten v. Harlowe* (D.C. Cir. 1936) 88 F.2d 755; (D.C.Cir. 1937) 90 F.2d 377; (D.C. Cir. 1939) 108 F.2d 8, and a number of other federal cases,[2] including diversity cases decided prior to *Erie R. Co. v. Tompkins*, 304 U.S. 64, the Court concluded that—

> . . . the general rule seems to require something more than mere inadequacy of the security and insolvency of

[1] The order appointing a receiver provides:

1 That a receiver pende lite of the rents, issues and profits of the mortgaged premises described in the complaint on file herein be appointed

2 Said receiver is hereby directed to manage and conserve the assets of said property, collect the rents, issues and profits of the same due and becoming payable during the pendency of this action.

3 Said receiver is hereby directed to examine and if necessary make copies of the records and accounts of the defendant, View Crest Garden Apartments, Inc., and report to the court on the rents and profits of the mortgaged premises received by the defendants herein during the pendency of this action and prior to the appointment and qualification of the receiver, and, further, report all expenditures made therefrom by said defendants.

4 Said receiver is further directed to apply all the rents and profits received from the management and operation of said property in accordance with the further order of this court.

[2] **Freedman's Savings & Trust Co. v. Shepard**, 127 U.S. 494; **Grant v. Phoenix Mutual Life Insurance Company**, 121 U.S. 105; **Teal v. Walker**, 111 U.S. 242; **Omaha Hotel Company v. Hountze**, 107 U.S. 378; **Garden Homes Inc. v. United States**, 200 F.2d 299, 207 F.2d 459; **Tower Grove Bank & Trust Co. v. Weinstein**, 119 F.2d 120; **Totten v. Harlowe**, 90 F.2d 377; **McNamara v. Hart**, 83 F.2d 649; **Associated Co. v. Greenhut**, 66 F.2d 428; **In re Morris White Holding Co.**, 52 F.2d 499; **Mortgage Loan Co. v. Livingston**, 45 F.2d 28; **Colonial Trust Co. v. Stone Harbor Electric Light & Power Co.**, 280 Fed. 245; **In re Clark Realty Co.**, 234 Fed. 576; **New York Trust Co. v. Michigan Traction Co.**, 193 Fed. 175; **Morrill v. American Reserve Bond Co.**, 151 Fed. 305; **In re Banner**, 149 Fed. 936; **Atlantic Trust Co. v. Dana**, 128 Fed. 209; **Central Trust Co. v. Chattanooga R. & C.R. Co.**, 94 Fed. 275; **O'Hara v. Mobile & O.R.Co.**, 75 Fed. 130.

> the debtor for the appointment of a receiver. The only question is how much more . . . .
> Totten v. Harlowe, supra, seems to announce a rule most consonant with justice for all parties concerned. There the court held that if the property is not of sufficient value to insure payment, and the mortgagor is insolvent, and there are superadded conditions which make an immediate foreclosure and sale impractical, courts of equity have power to take charge of the property both for the preservation of the corpus and application of the rents and profits upon the mortgaged debt. That is the rule that will be applied here, and the court then looks to the record to see if there are superadded conditions here making immediate foreclosure impractical.

In looking to the record to determine if such superadded conditions appeared in this case, the Court concluded that past and probable future delays in accomplishing foreclosure, delays for which appellant is at least partially responsible, justified appointment of a receiver.

The Government, of course, believes the action of the District Court in appointing a receiver should be sustained, but contends its right to a receiver must be judged solely by reference to the terms of the mortgage, and irrespective of adequacy of the security, solvency of the debtor, or "superadded conditions." Under this theory the Government would be entitled to a receiver upon default by the debtor and commencement of a foreclosure action.

Appellant, on the other hand, contends the Government is not entitled to a receiver except upon a showing of insolvency, inadequacy of security, and danger that the property will be wasted or deteriorated.

In *Garden Homes v. United States* (1 Cir. 1952) 200 F.2d 299, as here the District Court appointed a receiver with broad general powers to manage and operate the mortgaged property pending foreclosure, including power to collect its rents and profits during that time. The mortgage provided and the mortgagor apparently conceded that the appointment of a receiver to collect the rents and profits was proper, but contended that the District Court erred in giving the receiver power to manage and operate the property in addition to power to collect rents and profits during pendency of the foreclosure action. Faced with this contention, the Court suggested a distinction between (1) a situation justifying appointment of a

receiver with power only to collect rents, issue and profits due and becoming due during the pendency of a suit to foreclose, and (2) a situation justifying appointment of a receiver with power to manage the mortgaged property pending foreclosure, as well as to collect rent and profits during that time.

The Court indicated approval of the rule that a receiver with power only to collect rents and profits will not be appointed except upon a showing that (1) the mortgaged property is inadequate security, and (2) that the mortgagor or other person liable for the debt is insolvent; and that "to warrant the appointment of a receiver to manage and operate, as well as only to collect rents and profits, there must be at least a 'sufficient showing' of something more than the inadequacy of the security and the doubtful financial standing of the debtor." The Court concluded that there had not been a sufficient showing of something more, and that the District Court had "acted improvidently in giving the receiver general powers of operation and management in addition to power to collect rents and profits."[1]

In *Central Trust Co. of New York v. Chattanooga R. & C.R. Co.* (5 Cir. 1899), 96 Fed. 275, 281, it is stated:

> When the mortgaged property is not of value sufficient to secure the payment of the mortgage debt, or when its

[1] The Court said, 200 F.2d 299, 301-302:

> But how much in addition to these matters [inadequacy of the security and the doubtful financial standing of the debtor] must be shown to warrant the appointment of a general receiver we do not need to determine in this case, for up to this point all that has been made to appear, in addition to a clear showing of a valid mortgage and a **prima facie** indication of a default, are doubts, resting for the most part upon inferences, as to the value of the property as security and the financial stability of the debtor. Although the showing of these matters may not be "plain," we do not understand the defendant to complain of the appointment of a receiver to collect only rents and profits in view of the express provision in the mortgage permitting the appointment of such a receiver in the event of a default. However, from the meagre showing so far made, we think that even giving wide latitude to the discretionary powers of a court of equity in the premises, it must be said on the authorities cited herein that the court below acted improvidently in giving the receiver general powers of operation and management in addition to power to collect rents and profits.

The same case was appealed a second time: **Garden Homes v. United States** (1 Cir. 1953), 207 F.2d 459.

> sufficiency become substantially doubtful, and the mortgagor is insolvent, accruing interest matured and unpaid, like accruing taxes due and unpaid, takes the character of waste as clearly and distinctively as deteriorations by the cutting of timber, suffering dilapidations, etc. . . .

We hold that in an action brought to foreclose a mortgage insured under Title IX of the National Housing Act a District Court is empowered, under the terms of the mortgage and on application by the holder thereof, to appoint a receiver to collect the rents, issues and profits during the pendency of the foreclosure action, at least when he is satisfied the security is inadequate, or its adequacy is substantially doubtful, and the mortgagor is insolvent or of doubtful financial standing.

Even if inadequacy of the security and insolvency of the debtor did not appear, consideration of other circumstances discloses impressive reasons for appointing such a receiver in this case.

Mortgage insurance was provided pursuant to § 908 of Title IX of the National Housing Act, 12 U.S.C.A. § 1750g, which authorized the Federal Housing Commissioner to insure mortgages on multi-family rental projects. The House Report discloses that Title IX was enacted "to provide special mortgage insurance aids to private industry for the production of housing needed in defense areas," and that the FHA would be permitted to "underwrite projects which might not meet the long-term normal criteria of economic soundness, especially as to location and continued marketability, which are required under the regular FHA program." Appellants Article of Incorporation show that one of the principal objectives of the corporation was to secure financing under § 908.

"ARTICLE II

The purpose for which the corporation is formed and the business and objects to be carried on and promoted by it are as follows:

(a) To create a private corporation to provide housing for rent on a monthly or yearly basis or for sale, said corporation to be regulated by the Federal Housing Commissinoer as to rents or sales, charges, capital structure, rate of return and methods of operation, all pursuant to the provisions of Section 908 of Title IX of the National Housing Act, as amended, and as such to acquire any real estate or interest or rights therein or appurtenant thereto and any and all personal property in connection therewith.

(b) To improve and operate; and to sell, convey, assign, mortgage,

Without federal backing there would have been no loan, no mortgage, and probably no corporation. Congress, in order to obtain necessary rental accommodations for essential defense workers, authorized the Federal Housing Commissioner to provide financial insurance for risky, commercially unacceptable projects. It is not unnatural that the mortgage contains a provision entitling the holder to a receiver of rents and profits in the event of foreclosure. Having in mind the stipulation in the mortgage and the nature of the transaction, we perceive no good reason for saying that federal law denies to the government a remedy calculated to advance "the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act—to facilitate the building of homes by the use of federal credit . . ." *United States v. View Crest Garden Apts.* (9 Cir. 1959) 268 F.2d 380, 383. To the contrary, we think good reasons appear for holding that federal policy requires affording every reasonable protection to the security of federal investment. However, as inadequacy of the security and insolvency of the debtor do appear here, we need not go this far.

As noted, the District Court appointed a receiver not only to collect the rents, issue and profits of the mortgaged premises, but in addition, to manage the property during the pendency of the foreclosure action. The mortgage here does not provide

or lease, subject to provision (a) above, any real estate and any personal property.

(c) To borrow money and issue evidences of indebtedness in furtherance of any or all of the objects of its business, to secure the same by mortgage, deed of trust, pledge or other lien.

(d) To apply for and obtain or cause to be obtained from the Federal Housing Commissioner (hereinafter called the Commissioner) a contract or contracts of mortgage insurance pursuant to the provisions of the National Housing Act as amended and applicable Administrative Rules and Regulations, covering bonds, notes and other evidences of indebtedness issued by this corporation and any indenture of Mortgage or Deed of Trust securing the same. So long as any property of this corporation is encumbered by a mortgage or Deed of Trust insured by the Commissioner it shall engage in no business other than the construction and operation of a Rental Housing Project or Projects.

(e) To enter into, perform and carry out contracts of any kind necessary to, or in connection with, or incidental to the accomplishment of any one or more of the purposes of the corporation.

for appointment of a receiver with these additional powers. We adhere to the distinction drawn in *Garden Homes v. United States* (1 Cir. 1952) 200 F.2d 299: between a receiver wth power only to collect rents and profits and a receiver with the additional power to manage the property. Receivership is an equitable remedy and a receiver will be appointed when "the most speedy and perfect administration of justice and the rights of the parties interested in the property will be best secured by such action." *Morrill v. American Reserve Bond Co.* (8 Cir. 1907) 151 Fed. 305, 313. It having been determined that appointment of a receiver to collect the rents and profits is proper, sensible administration may require that the receiver be given the additional power to manage the property, particularly where, as here, an additional factor appears

The additional factor may be the danger of waste. *Omaha Hotel Co. v. Kountze*, 107 U.S. 378 (1883); *Grant v. Phoenix Mutual Life Insurance Company*, 121 U.S. 105 (1887); *Freedman's Savings & Trust Co. v. Shepard*, 127 U.S. 494 (1888). More recently, this additional factor has been spoken of as a "superadded condition." *Totten v. Harlowe* (D.C. Cir. 1937) 90 F.2d 377, or merely as "something more." *Garden Homes v. United States* (1 Cir. 1952) 200 F.2d 299. In brief, it may be any circumstance which commends itself to a court of equity as a reason for granting the relief sought.

In this case the District Court decided, in the light of past and prospective delays in accomplishing foreclosure, that the time had come for appointment of a receiver. Some of the delays he referred to in his oral opinion set out in the footnote. We think impossibility or impracticability of prompt foreclosure, irrespective of the fault therefor, is a circumstance

"First, it should be noted that the complaint for the foreclosure of these mortgages was filed on March 18, 1958, almost one year and nine months ago. While this delay in itself is unconscionable, the fault thereof cannot be laid entirely at defendants' doorstep, but enough can, namely, defendants caused substitution of counsel which prevented expeditious foreclosure.

"Moreover, defendants, in their answer, deny the validity of the obligation evidenced by the mortgage involved. In addition, they allege, as one of five affirmative defenses, that the dispute has been orally settled and compromised. Counsel for the defendants admitted, in open court

proper for consideration, and that in appointing a receiver with broad authority the Court acted well within the discretionary powers a court of equity exercises in appointing a receiver.

Affirmed.

(Endorsed) Opinion Filed Aug. 2, 1960.

Frank H. Schmid, Clerk.

upon the last hearing had in this matter that foreclosure could not be expeditiously accomplished. All of these things indicate to the court that in addition to all of the delays which have already transpired further delays are to be expected."

APPENDIX B

Title 12, U.S.C., Section 1707

Definitions

As used in Section 1709 of this title—

(a) The term "mortgage" means a first mortgage on real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed; and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the state, in which the real estate is located, together with the credit instruments, if any, secured thereby.

APPENDIX C

Title 12 U.S.C. Sec. 1750

Definitions

As used in this subchapter, the terms "mortgage", "first mortgage", "mortgagee", "mortgagor", "maturity date" and "state" shall have the same meaning as in Section 1707 of this title, June 27, 1934, c. 847, Title IX, Sec. 901, as added Sept 1, 1951; c. 378, Title II, Sec. 201, 65 Stat. 295.

APPENDIX D

Revised Code of Washington 7.28.230

Mortgagee cannot maintain action for possession.

A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law.